

1 JEFFRY K. FINER
2 West 35 Main • Suite 300
3 Spokane, WA 99201
4 (509) 981-8960

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,) CR-11-159-RHW
8)
9 Plaintiff,) DEFENDANT'S SENTENCING
10) MEMORANDUM
11 vs.)
12)
13 DORIS E. NELSON,)
14)
15 Defendant.)

16 Now comes the Defendant, Doris E. Nelson, by and through her
17 attorneys, Jeffry K. Finer and Elizabeth Kelley, and hereby submits this
18 Sentencing Memorandum in advance of her sentencing hearing currently
19 scheduled for November 3, 2014.

20 **DORIS NELSON'S BACKGROUND AND THE RISE OF THE LITTLE**
21 **LOAN SHOPPE**

22 Doris Nelson is a mother, grandmother, wife, and daughter. She is a
23 55-year-old woman with no criminal record. Whatever the amount lost by
24 investors, the fact remains that for several years, Ms. Nelson, in her capacity

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1 as owner of the Little Loan Shoppe, distributed millions of dollars in loans and
2 helped countless low- and middle-income individuals. She was an original
3 member of the Online Lenders Association, a Washington, DC-based trade
4 group which developed a detailed code of best practices for consumer loans.
5 Prior to her indictment, she was active in her community and church. She is
6 in fragile health and under the care of a psychiatrist.
7

8 **a. Social History**

9 She was born Doris Elizabeth Larnbertis on March 22, 1959, in
10 Vancouver, British Columbia. Ms. Nelson moved to Honolulu, Hawaii in
11 1964 with her mother and her new stepfather. After attending elementary
12 schools in Honolulu, Doris moved with her mother back to Vancouver, B.C.,
13 where she attended Como Lake Junior High School through the tenth grade.
14

15 Doris Nelson did not complete her high school education. At age 18,
16 Ms. Nelson had a job selling encyclopedias for a short time. She soon
17 relocated to Edmonton, Alberta, Canada to work as a secretary for a silkscreen
18 printer. After a short time she moved back to Vancouver to take a job with
19 Grantree Furniture Rental. Soon thereafter she took a job with Smithrite
20 Disposal, in telephone sales, where she worked for about four years. In 1981,
21 she married at age 22. Two years later, on March 6, 1983, she gave birth to her
22
23
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1 first child. Her employer, Smithrite, offered her a buyout in 1983, which she
2 accepted because they had sold the company.

3 While at home in 1983, Ms. Nelson turned to self-employment selling
4 coupon books. She ran that business for about six years. Her second child was
5 born in 1986. Ms. Nelson and her husband, now with two children, separated
6 in 1991, and divorced in 1993. Her third child was born in 1994.

8 **b. Entry into the payday loan industry**

9 In 1997, Ms. Nelson, now single and with three children to raise,
10 applied for a payday loan, and paid it in full when it came due. She became
11 interested in how the loan process worked as she was looking for a job which
12 would allow her to stay at home with her children. She explored starting her
13 own payday loan business. She took on a partner, and they went to various
14 banks in order to get financing. All the banks turned them down. Ms. Nelson
15 and her partner persisted. They opened a payday loan business at a storefront
16 shop in Abbotsford, B.C., calling it The Little Loan Shoppe. They used their
17 own funds to start the business, along with funds from others.

18 A payday loan is typically a loan for a period covering the time between
19 paychecks; in contrast, a shortterm loan usually involves scheduled
20 repayments of both principal and interest. The Little Loan Shoppe business

1 model called for applicants to submit their pay stubs and complete an
2 application. The business would then check to make sure the potential
3 customer was actually employed. The payday loan business charged \$25 for
4 every \$100 borrowed, up to a maximum of \$500. That first year the business
5 had to turn potential customers away because it ran out of funds with which to
6 make loans. Within two years The Little Loan Shoppe had four stores in the
7 Abbotsford area.
8

9
10 **c. Early expansion of Little Loan Shoppe**

11 After about five years running the storefront payday loan businesses, in
12 the Spring of 2002 or 2003, the business expanded further, getting two 1-800
13 telephone numbers, and advertising throughout British Columbia. Then, in
14 2004, the business began advertising all across Canada, except for Quebec. It
15 utilized television ads and yellow pages' ads. Doris Nelson was at this time
16 living in the United States, having moved here in 2001 in order to be with her
17 new husband, Dennis Nelson.
18

19 Storefronts in Spokane were opened in 2002, and the storefronts in
20 Canada were closed in 2003. The Spokane stores were located on East Mission
21 Street, in Airway Heights, on Mullan Road, and on Northwest Boulevard.
22 Eventually the business moved to a two-story building on West Broadway in
23
24

1 Spokane, which location became the main business office for The Little Loan
2 Shoppe. The 1-800 telephone system calls rang into the West Broadway
3 building in Spokane. By this time, 2003, the business had customers in
4 Washington, Idaho, and across Canada.
5

6 In the Fall of 2005, along with TD Canada Trust, the business began
7 using Wells Fargo Bank, Spokane, Washington. This was done because Wells
8 Fargo could work with customers in both Canada and the United States, and
9 whereas TD Canada Trust could not operate outside of Canada.
10

11 **d. Involvement of “Investor Enablers”**

12 In 2005 the business opened certain corporations in Canada, each one a
13 company with a bank account. Those bank accounts were utilized to repay
14 investors or to receive investment funds. Ms. Nelson opened these businesses
15 on the advice of Paul Cooper, Alex Mirrow and Margaret Miller – described
16 by bankruptcy examiner Charles Hall as “investor enablers.” Cooper toured
17 the stores in Abbotsford before they closed. Cooper and his sister, Miller, then
18 started their own company so solicit investments for The Little Loan Shoppe.
19 They were paid an agreed commission for each investment they brought into
20 The Little Loan Shoppe. Cooper then met Alex Mirrow, a fellow congregant
21 within the Jehovah Witnesses. Alex Mirrow investigated The Little Loan
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24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 Shoppe, and thereafter invested several hundred thousand dollars in the
2 company. Mirrow was paid commissions and also referred potential investors
3 to Cooper. The majority of investors brought in by Cooper and Mirrow were
4 also Jehovah Witnesses.
5

6 **e. Bad debts and failed profitability**

7 The Little Loan Shoppe made minimal profit in 2006-2007. In 2006, the
8 Little Loan Shoppe took a bad debt write-off of at least a million dollars, and
9 in 2007, of five million dollars. Moreover, she communicated to her
10 investors that the company was having difficulties.
11

12 The payday loan business by now was staffed by a company called
13 Team Spirit America (TSA). This company ran the call center for LLS
14 America and LLS Canada. The offices on West Broadway Avenue also
15 housed Global Edge Marketing (GEM), a lead provider which began in
16 2007- 2008, owned by Dennis Nelson. In the summer of 2008, TSA
17 employed approximately 160 persons. Doris Nelson was the only employee
18 for The Little Loan Shoppe.
19
20

21 Meanwhile, the economy was poised on the worst economic downturn
22 since the Great Depression. In September 2008, Ms. Nelson realized that her
23 company was in deep trouble as consumer payday repayment rates plummeted
24

1 but her obligations to the investors piled higher and higher. As a result, she
2 stopped accepting investment funds, and hired Fruci and Associates, a
3 Spokane, Washington accounting firm to assist with the accounting work. The
4 last investment received by The Little Loan Shoppe was on September 23,
5 2008, although the business operated for another four years. Pressure from
6 Wells Fargo to collect bad debts increased to the point that electronic payment
7 submissions (“ACH” debit systems) were resulting in bank charges for
8 insufficient funds that wildly exceeded the minimal debits collected. In one
9 month alone, bank charges exceeded \$283,000. The Little Loan Shoppe was
10 hemorrhaging from commission debts to the investors, plummeting income
11 from consumer loan repayments, and crippling bank charges.

12
13
14
15 In early October 2008, Ms. Nelson notified all investors that the interest
16 payments were only going to be 10% from that point on. At about that same
17 time B.C. Securities issued a cease and desist letter on October 7, 2008.

18
19 The Little Loan Shoppe was brought into bankruptcy court involuntarily
20 in Spokane, and voluntarily in Nevada. Ms. Nelson was not involved in the
21 business from March 2009 to October 22, 2009. At first Ms. Nelson’s son,
22 Chris Foster, ran the company to June 6, 2009. Then Ralph Gamble, who had
23 previously been the manager of the sales floor and bad debt collection, was
24

1 called in to run the company.

2 On October 22, 2009, Ms. Nelson was reinstalled as the head of the
3 business, and ran it for another 20 months. Under the bankruptcy automatic
4 stay, the company made a profit from July 21, 2009 to June 2012, at which
5 time the company was shut down.
6

7 On April 6, 2010, government investigators served search warrants on
8 the Nelson residence as well as on the offices of The Little Loan Shoppe,
9 seizing all checks, hard drives, investor information, vehicles, jewelry,
10 artwork, a recreational vehicle, and some cash. Ms. Nelson continued to run
11 the company until the trustee in bankruptcy took over on April 23, 2011. Ms.
12 Nelson was arrested on November 17, 2011. She spent the holidays in the
13 Spokane County Jail while her husband raised funds for her bond.
14
15

16 **BRIEF HISTORY OF THE CASE**

17 On April 3, 2014, after her case had been pending for approximately
18 three years, Ms. Nelson, on the advice of previous counsel, pled open to the
19 110 count indictment. The indictment included seventy-one counts of Wire
20 Fraud in violation of 18 U.S.C. Section 1343 (Counts 1-71); twenty-two
21 counts of Mail Fraud, in violation of 18 U.S.C. Section 1341 (Counts 72-93);
22 and seventeen counts of International Money Laundering, in violation of 18
23
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 U.S.C. Section 1956 (a)(2)(A) (Counts 94-110). Ms. Nelson had previously
2 rejected two written plea agreements which included sentences of ten and
3 twenty years.

4
5 On July 9, 2014, undersigned counsel, on behalf of Ms. Nelson, filed a
6 Motion to Withdraw Guilty Plea. The Motion was accompanied by a
7 Memorandum and six declarations; testimony was not offered. On July 14,
8 2014, the Court denied the Motion and set sentencing for November 3, 2014.

9
10 During the approximately four months during which present counsel has
11 been involved in this case, it has discovered voluminous evidence which was
12 either never turned over to the defense, or if turned over not put to use,
13 including additional expert reports and witnesses rebutting the government's
14 expert. Defense counsel continues its investigation notwithstanding
15 inadequate funding for experts, but nonetheless finds itself filing this
16 Memorandum on this date as ordered by the Court.

17 THE INDICTMENT

18
19 Although Ms. Nelson's admission to a factual basis for her open plea
20 stands in the eyes of the Court, she takes issue with the following points as the
21 affect this Court's determination of relevant conduct and the loss calculation:
22

23 As a general matter, the term Ponzi does not appear in the federal
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 criminal code. The term is well defined in bankruptcy law. A Ponzi scheme is
2 a financial fraud that induces investment by promising extremely high,
3 risk-free returns, usually in a short time period, from an allegedly legitimate
4 business venture. “The fraud consists of funnelling proceeds received from
5 new investors to previous investors in the guise of profits from the alleged
6 business venture, thereby cultivating an illusion that a legitimate profit-making
7 business opportunity exists and inducing further investment. *In re United*
8 *Energy Corp.*, 944 F.2d 589, 590 n.1 (9th Cir. 1991). *See generally*
9 *Cunningham v. Brown*, 265 U.S. 1, 7-9, 44 S.Ct. 424, 68 L.Ed. 873
10 (1924)(detailing the remarkable criminal financial career of Charles Ponzi);
11 *Donnell v. Kowell*, 533 F.3d 762, 767 n.2 (9th Cir. 2008).

12
13
14 On page 4, paragraph nine, it is not true that Doris Nelson exercised
15 control over 360 Northwest Telecom LLC.

16
17 On page 4, paragraph 10, it is not true that Doris Nelson exercised
18 control over D&D Associates LLC.

19
20 On page 5-6, paragraph 16, it is not true that Doris Nelson exercised
21 control over Global Edge Marketing LLC.

22
23 On page 6, paragraph 17, it is not true that Doris Nelson exercised
24 control over D & C Lead Marketing LLC.

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 On page 11, paragraph 27, the Court should be aware that the defendant
2 ran a legitimate business lending money to tens of thousands of people. In
3 some years the company made a profit, and some years the company operated
4 at a loss. It is improper to characterize the business as a Ponzi scheme. Indeed,
5 five different sources conclude that the Little Loan Shoppe was not a Ponzi
6 scheme: the forensic report compiled by A & M which was retained by
7 previous counsel; the report submitted by Marie Rice in the bankruptcy
8 proceeding; the Declaration submitted by Lenore Romney in the bankruptcy
9 proceeding; the Declaration submitted by Conrad Lysiak in the Motion to
10 Vacate Plea (ECF No. 224); and the Declaration submitted by John Munding
11 in the Motion to Continue Sentencing to be filed later with this Court. *See*
12 Declaration of John Munding.
13
14
15

16 On page 12, paragraph 28, the court should be aware that there are no
17 "Defendant Businesses." There were in the original Indictment, but eliminated
18 in the Superseding Indictment.
19

20 On page 13, paragraph 31, the business utilized banks in both Canada
21 and the United States in order to accept payment on loans and to deposit
22 investor funds. In the United States the business used Bank of America, and
23 Wells Fargo Bank. The business used TD Canada Trust in order to debit the
24

1 accounts of loan customers in Canada. That ended in 2005 when the business
2 opened an account at Wells Fargo, here in Spokane, to debit customer
3 accounts in both the United States and Canada.

4
5 On page 13, paragraph 32, the Superseding Indictment uses the phrase
6 "exorbitant lulling payments." In fact, the interest payments to investors were
7 what the investors had contracted for, what they expected. They were derived
8 from a high-risk business charging extremely high rates of interest to
9 short-term borrowers as was known to the principal investment recruiters.
10
11 *That is the nature of the payday loan business.* The investors received
12 promissory notes for their investments and post-dated checks in order to
13 effectuate the disbursement of the contractual interest payments.

14
15 On page 15, paragraph 35, Ms. Nelson believes that the payout as sales
16 commissions to various persons was higher than alleged in the Superseding
17 Indictment at \$2,049,002.

18
19 On page 15, paragraph 36, these figures are based on checks written on
20 the company books payable to the defendant but which were used to pay for
21 company expenses such as interest payments to investors and payment of
22 company bills for such things as office products and utilities. Defendant
23 compensated herself for her ownership of and work with the company through
24

1 a bookkeeping entry called "members withdrawal." Numerous entries
2 designated as "members withdrawal" were in fact expenses attributable to the
3 company. The accounting relied upon by the government does not take these
4 discrepancies into account.
5

6 On page 16, paragraph 38, the Court should be aware that the motor
7 home was financed by a \$50,000 members withdrawal, and the balance was
8 borrowed from Dennis Nelson's personal credit lines. The Chevrolet Corvette
9 purchase was funded by a \$35,000 members withdrawal, and the balance was
10 borrowed from the personal credit lines of Dennis Nelson. The Mercedes Benz
11 was funded by a \$30,000 members withdrawal and with \$50,000 borrowed by
12 Dennis Nelson from his personal lines of credit. The balance of the purchase
13 priceio was the credit given for a trade-in vehicle previously owned by Dennis
14 Nelson as his separate property.
15
16

17 On page 17, paragraph 40, the Court should be aware that some of the
18 gambling money came from "members withdraw," and some of the money
19 came from defendants' gambling winnings at the Northern Quest Casino at
20 Airway Heights, Washington.
21

22 On page 17, paragraph 41, the Court should be aware that, according to
23 defendants' husband, Dennis Nelson, he purchased the artwork with money
24

1 from a loan he took out at HSBC (Hong Kong British Columbia Bank) . No
2 funds from any business operated by Doris Nelson were used to purchase
3 artwork on the Royal Caribbean Cruise. Both Doris and Dennis Nelson took
4 out loans to fund the trip, and Mr. Nelson paid back both loans.
5

6 On page 17-18, paragraph 42, Ms. Nelson offered all investors interest
7 at 10%, not just "some," as the government alleged in the Superseding
8 Indictment.
9

10 On page 21, paragraph 48, the indictment alleges that Ms. Nelson said
11 that her company was doing well. This was true because she knew that in 2007
12 that the company was going to make a small profit for the year.
13

14 On page 21-22, paragraph 49, the memo from victim investor Wes Rist
15 (W.R.) does not say who owned the building on West Broadway in Spokane.
16 It reads, "They currently own their own building" Bates #:
17 027-001-0001-0035. On pages 22-23, paragraph 50, the company made a
18 small profit in 2007 of approximately \$1 million, after writing off bad debt
19 accrued previously.
20

21 On page 23, paragraph 51, Ms. Nelson asserts that the company was
22 growing in 2007 and 2008, with Ralph Gamble as managing officer. The
23 company took a \$15 million write off for 2008, leaving the company with a
24

1 net loss of \$9 million for the 2008 tax year.

2 On page 24, paragraph 52, the paragraph suggests that certain
3 companies could not survive out of the fold. However, D & C Lead Marketing
4 is still in business, doing business as Adworkz. 360 Northwest Telecom is still
5 in business, now doing business as Spokane Telephone. The collection
6 company and the computer programmer company were absorbed into the
7 bankruptcy proceedings.
8

9 On page 25, paragraph 53, the annual percentage rate for payday loan
10 customers was over 500%, so paying 50% on investment funds was typical for
11 this industry. Further, the TEN YEAR PROMISSORY NOTE provided to
12 investor Moshen Bagherian on July 24, 2007 states that those investment
13 funds will be used to operate any of the companies associated with The Little
14 Loan Shoppe.
15
16

17 On pages 26-27, paragraphs 54-56, at the time the referenced email was
18 sent out, May 6, 2008, The Little Loan Shoppe was not paying for the leads.
19 The Little Loan Shoppe only began paying for the leads around the time of the
20 filing of the bankruptcy.
21

22 On page 29, paragraph 57, Anthony Gargiulo, a named victim investor,
23 is a lawyer. Gargiulo visited the offices of The Little Loan Shoppe in order to
24

1 determine whether he wanted to invest in the company. Mr. Gargiulo was
2 involved in the decision-making process at The Little Loan Shoppe, aiding in
3 deciding what direction the company should take. He acted as a mentor for
4 defendant.
5

6 On page 29, paragraph 58, the named victim investor, Wes Rist (WR),
7 was interviewed by Internal Revenue Service Investigator Andrew Menck on
8 September 23, 2010. Menck recorded that conversation in his notes, writing
9 about June 17, 2008, "Rist may have received a call in response" to his inquiry
10 about sending in more investment money to The Little Loan Shoppe.
11

12 On page 30, paragraph 59, where the Superseding Indictment speaks
13 about LLS becoming one of the largest companies, it should read "one of the
14 largest on-line loan companies." The Little Loan Shoppe had Eric Olsen, a
15 statistician, on staff. The Little Loan Shoppe also utilized TranDotCom for its
16 internet database for payday loans, and TranDotCom had statistics about the
17 relative size of the LLS operation.
18

19 On pages 32-33, paragraph 65, came in after September 23, 2008,
20 company of \$50,000. At this time, the Little Loan Shoppe had no new
21 investment money except one loan in December 2008. The funds from loan
22 repayments was used to pay investors interest payments, support new payday
23
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 loans, and cover the day-to-day expenses of the company.

2 On page 35, paragraph 70, promissory notes state that the funds
3 invested can be used for business purposes. It was the purpose and intent of
4 the business to support payment of interest on investments through several
5 banks located in Canada and the United States.
6

7 THE LAW

8 Federal law criminalizes "any scheme or artifice to defraud, or for
9 obtaining money or property by means of false or fraudulent pretenses."
10

11 The Superseding Indictment outlined the fraud allegations by alleging
12 that Defendant Nelson devised and intended to devise a scheme and artifice to
13 defraud and for obtaining money or property by means of materially false and
14 fraudulent pretenses, representations and promises, which representations and
15 promises were transmitted to the alleged victims by wire or mail.
16

17 Wire fraud has three elements: (1) a scheme to defraud; (2) use of wires
18 in furtherance of the scheme; and (3) a specific intent to deceive or defraud.
19

20 *United States v. Green*, 592 F.3d 1057, 1064 (9th Cir. 2010) .

21 Mail fraud has as element (2) the use of the mail system. Each
22 individual act committed in a post office of taking out or putting in a letter in
23 furtherance of such scheme is a separate and distinct violation. *United States v.*
24

1 *Anderson*, 59 F.3d 1323, 1337 (D.C. Cir. 1995); *United States v. Joyce*, 499
2 F.2d 9, 18 (7th Cir. 1974); *United States v. Toney*, 598 F. 2d 1349 (5th Cir.
3 1979). The "mailing" element of the crime of mail fraud has two requirements:
4 (1) that the defendant caused the use of the mails; and (2) that the mailing was
5 "for the purpose of executing" the fraudulent scheme. *See United States v.*
6 *Stewart*, 185 F.3d 112, 123 (3d Cir.), *cert. denied*, 120 S.Ct. 618 (1999).

7
8 Here, the government charges that Doris Nelson solicited investors by
9 promising high yields to be paid from profits derived from payday loans, but
10 that she failed to disclose to those investors that the lending business
11 operations had not been profitable in the past, and, further, that the investors
12 would receive payments on their investments from funds coming to the
13 company from new investors.
14
15

16 DEFENSE POSITION

17 The Superseding Indictment charges that Ms. Nelson ran a short-term or
18 payday loan business in which promises were made to investors which were
19 false and misleading. Admittedly, Ms. Nelson owned and operated the payday
20 loan business, The Little Loan Shoppe, until the bankruptcy court took over
21 the business and the bankruptcy court thereafter conducted that business
22 through a trustee appointed by the bankruptcy court. The Superseding
23
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 Indictment further charges that false promises were communicated to investors
2 by mail and wire.

3 In response, Ms. Nelson contends that the business was making a profit
4 until approximately 2008, when the economy began to sour, investments
5 stopped, borrowers could not repay their loans, and The Little Loan Shoppe
6 could not honor its obligations when due. Three expert reports support this:
7 the report by A & M, the forensic accounting firm retained by original
8 counsel; a report by accountant Marie Rice, filed in the bankruptcy
9 proceeding; and the declaration filed by accountant and certified fraud
10 examiner Lenore Romney, also filed in the bankruptcy proceeding.
11

12 Ms. Nelson is also charged with seventeen counts of international
13 money laundering. In response, she would argue that there was no intent to
14 engage in unlawful activity, but rather, it was necessary that the various
15 businesses run by Ms. Nelson utilize various banks in both Canada and the
16 United States. These were legitimate business transactions. No banks were
17 defrauded or lost any money from the transfers of money between the various
18 banks utilized by her.
19
20
21

22 SENTENCING GUIDELINES

23 The United States Sentencing Guidelines advise a base offense level of
24

1 7 on the fraud counts. USSG 2B1.1(a)(1). Because the number of identified
2 victims exceeds ten, two points must be added according to 2B1(b)(2)(A).

3 The government may seek to have 2 points added pursuant to 2B1. 1
4 (b)(16), asserting that Ms. Nelson derived more than \$1 million in gross
5 receipts from financial institutions. Ms. Nelson disputes that figure. It is the
6 intent of that particular portion of the Guidelines that the funds should have
7 been defrauded from a bank. That is not the case here. No bank was
8 defrauded. No bank suffered a loss. Indeed, Ms. Nelson was a valued
9 customer of Wells Fargo. She was the only client of her personal business
10 banker, and because of the volume of her business, he received many bonuses.
11 Moreover, funds merely passed through the banks utilized by Ms. Nelson and
12 her companies.
13

14 The government may request the Court to increase the total offense
15 level by adding 22 points based on the alleged amount of loss. 281.1 (b)(1)(L).
16 The government claims the loss is over \$20 million. However, the
17 government has refused to share with the defense any information on how they
18 arrive at that calculation. At one point, prior to the change of plea hearing, the
19 government wrote:
20
21
22
23

24 The bankruptcy examiners findings calculate that NELSON secured

Jeffrey K. Finer PS

35 W Main Street • Suite 300
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509.464.7611 jeffry@finer-bering.com

1 approximately \$135.4 million (US\$ and CAN\$ combined) NELSON
2 received from investors and paid out approximately \$117.6 million to
3 investors as purported 'interest' and principal payments.
4

5 According to the bankruptcy examiner, the net loss appears to be well below
6 the 20 million dollar level at \$17.8 million. In the application notes(3) (C) to
7 U.S.S.G. §281.1, it reads:

8 Estimation of Loss. The court need only make a reasonable estimate of
9 the loss. The sentencing judge is in a unique position to assess the
10 evidence and estimate the loss based on that evidence. For this reason,
11 the court's loss determination IS entitled to appropriate deference. See
12 18 U.S. C. §3742(e) and (f).
13
14

15 Excluded from the loss calculation is interest of any kind, and amounts
16 based on an agreed-upon return or rate of return. (Application notes, (3)(D) to
17 U.S.S.G. 281.14). Loss shall be reduced by the money returned by the
18 defendant before the offense was detected. (Application notes, (3)(E) to
19 U.S.S.G. 281.1). In the case involving a fraudulent investment scheme loss
20 shall not be reduced by the money transferred to any individual investor in the
21 scheme in excess of that investor's principal investment. (Application notes,
22 (3)(F)(iv) to U.S.S.G. 281.1).
23
24

1 The government may argue that the offense level should be increased by
2 2 levels based upon U.S. S. G. §281. 1 (b) (16), which calls for an increase if
3 the defendant derived more than \$1 million in gross receipts from one or more
4 financial institutions. However, Ms. Nelson argues that this Offense
5 Characteristic does not apply because the funds came from individual
6 investors and not from banks. No financial institution lost any money. The
7 requested 2 level increase would be a misapplication of the section. The
8 application notes shed no light on this issue.

9
10
11 As of the writing of this Memorandum, counsel for Ms. Nelson cannot
12 calculate loss with any precision. As will be supported in subsequent filings,
13 the amount of new information which defense counsel has received in the past
14 ten days is breathtaking. Moreover, until the Court grants funding to retain
15 Marie Rice and Lenore Romney, as well as enable A & M to finish its report,
16 counsel is unable to calculate loss or effectively challenge the government's
17 expert.
18

19 GUIDELINES CALCULATION

20
21 Ms. Nelson contends, and the expert's report concurs, that the loss was
22 far less than \$20 million. The government has not shown any proof that there
23 were over 250 bona fide victims. The Court should not allow application of
24

1 U.S.S.G. §2B1.1(b) (16) because the funds were held in financial institutions
2 but did not belong to those financial institutions. Finally, defendant did not
3 move to the United States to avoid Canadian authorities. She married a U.S.
4 citizen who happened to reside in Spokane, Washington.
5

6 The money laundering counts are calculated pursuant to U.S.S.G.
7 §2S1.1(a) (1). The calculation involves the use of the offense level for the
8 fraud counts. Thus, we begin with level 25. Since the money laundering
9 charges were pursuant to 18 U.S.C. §1956(a) (2) (A) and (2), U.S.S.G. §
10 2S1.1 (b) (2) (B) calls for a 2 level increase for a conviction under that statute.
11 U.S.S.G. 2S1.1, Grouping of Multiple Counts, Application note 6 says the
12 counts shall be grouped under 3D1.2(c) (Groups of Closely-Related Counts).
13
14

15 §3553 FACTORS

16 On January 12, 2005, the Supreme Court held in *United States v.*
17 *Booker*, 125 S.Ct. 738, 767 (2005), that the provisions of the Federal
18 Sentencing Act that made the guidelines binding violated the Sixth
19 Amendment. Along with those guidelines, the trial courts are directed to
20 review the language of 18 U.S.C. §3553(a), and "impose a sentence sufficient,
21 but not greater than necessary, to comply with the purposes set forth in
22 paragraph (2) of this subsection."
23
24

1 Section 3553(s) states as follows:

2 § 3553. Imposition of a sentence.

3 (a) Factors to be considered in imposing a sentence. - The court shall
4 impose a sentence sufficient, but not greater than necessary, to comply
5 with the purposes set forth in paragraph (2) of this subsection. The
6 court, in determining the particular sentence to be imposed, shall
7 consider --
8

9 (1) the nature and circumstances of the offense and the history and
10 characteristics of the defendant;
11

12 (2) the need for the sentence imposed -

13 (A) to reflect the seriousness of the offense, to promote respect for the
14 law, and to provide just punishment for the offense;
15

16 (B) to afford adequate deterrence to criminal conduct;

17 (C) to protect the public from further crimes of the defendant; and

18 (D) to provide the defendant with needed educational or vocational
19 training, medical care, or other correctional treatment in the most
20 effective manner;
21

22 (3) the kinds of sentences available;

23 (4) the kinds of sentence and sentencing range established for -
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 (A) the applicable category of offense committed by the applicable
2 category of defendant as set forth in the guidelines

3 (B) (Omitted)

4 (5) any pertinent policy statement -

5 (A) issued by the Sentencing Commission

6 (B) (Omitted)

7 (6) the need to avoid unwarranted sentencing disparities among
8 defendants with similar records who have been found guilty of similar
9 conduct; and
10

11 (7) the need to provide restitution to any victims of the offense.
12

13 3553 (A) Factors As Applied to Doris Nelson

14 (1) NATURE AND CIRCUMSTANCES OF THE OFFENSE AND
15 DEFENDANT

16 The 110 counts involved a business plan to make payday or short-term,
17 high interest loans over the internet. The business began modestly, but soon
18 grew into a multi-national company doing business on the internet. The
19 company had two parts. The first part took in investments, money to be used in
20 making the small loans to customers. The second part of the company made
21 those loans and tracked the loans. Doris Nelson does not have a high school
22 diploma or any formal business training. She was the proprietor of a payday
23
24

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1 loan business, eventually becoming the sole owner, after buying out the
2 interests of early investors. She ran the business as a sole proprietorship, and,
3 along the way crafted other businesses to assist the main business. One of
4 those rented the building to The Little Loan Shoppe. Another obtained leads
5 for the loan section.
6

7 The 2008 downturn in the economy hit the business hard. It didn't help
8 that the business Doris ran promised interest rates in the 60% range. It didn't
9 help that the company did not make money when the economy was hurting. It
10 didn't help that the defendant's business unilaterally decided to reduce all the
11 previously contracted interest rates down to 10%, and then stopped paying
12 interest to investors altogether. It is clear that Ms. Nelson was in over her head
13 and trusted others to give her proper advice. She was dealing with the
14 lending statutes of Canadian provinces and several states. She had over 150
15 employees at the height of the business. Her accounting procedures were
16 insufficient to keep up with the growth of the business.
17
18
19

20 Repeatedly, the government has cited Ms. Nelson's "lavish lifestyle."
21 These accusations are baseless. Many items of jewelry were given to her by
22 her family long before her business became successful. The trips were largely
23 business-related. John Munding, one of her bankruptcy trustees, noted in his
24

1 Declaration that when the so-called valuable art was sold, it was akin to
2 "something from Pier One." The Nordstrom card was not a Nordstrom card
3 but rather, a Visa card issued through Nordstrom which was used for all sorts
4 of business-related expenses. And although Ms. Nelson did gamble, all of the
5 funds she used were personal funds.
6

7 (2) THE NEED FOR THE SENTENCE IMPOSED TO REFLECT THE
8 SERIOUSNESS OF THE OFFENSE
9

10 The Court must consider the kinds of sentences available for Doris Nelson.
11 Given the nature of the offense to which Ms. Nelson pled, a prison term is
12 certain. What remains to be determined is how the long the sentence should
13 be.
14

15 The Court must consult and consider applicable Guideline provisions
16 and Guidelines Policy Statements, but is now permitted "to tailor the sentence
17 in light of other statutory concerns as well, see § 3553(a)." *Booker*, 543 U.S. at
18 245. "As a matter of administration and to secure nationwide consistency, the
19 Guidelines should be the starting point and the initial benchmark. The
20 Guidelines are not the only consideration, however." *Gall*, 552 U.S. at 49.
21 Under the *Booker-Gall-Kimbrough* line of cases, the Court IS fully
22 empowered to disagree with the Guidelines and Guidelines Policy Statements.
23
24

Jeffrey K. Finer, PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 The Supreme Court only requires that any such disagreement, and any
2 deviation from the Guidelines range, must be acknowledged and explained by
3 the sentencing court, typically in reference to the § 3553(a) factors.

4
5 Doris Nelson respectfully submits that she has given the Court
6 compelling reasons to downwardly depart from the Advisory Guidelines range
7 given the many mitigating factors mentioned in this Sentencing Memo. This
8 is true even assuming the Court considers the Guidelines §2B 1.1 loss table to
9 be rationally based. But the §2B 1.1 Guidelines fraud loss table has little
10 empirical value. The harsh sentencing recommendations of §2B1.1 are not
11 based on past practice or empirical data and have been increasingly rejected by
12 sentencing courts in high-loss, moderate loss, and low-loss fraud cases.

13
14 Over the past twenty years, the Sentencing Commission has
15 dramatically increased the severity of sentences for fraud offenders by raising
16 the number of points imposed for the amount of loss and by approving a
17 five-fold expansion in the number of specific offense characteristics. Because
18 the Commission failed to rely on empirical data when making these changes -
19 and thus failed to fulfill its institutional role - sentencing courts have broad
20 discretion to disagree, on policy grounds, with §2B 1.1 's sentencing
21 recommendations. *See Spears*, 555 U.S. 261, 264 (2009) (when the
22
23
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 Commission fails to fulfill its institutional role, a district court can vary from
2 the guidelines "based on policy disagreement with them, and not simply based
3 on an individualized determination that they yield an excessive sentence in a
4 particular case").

5
6 When the Sentencing Commission adopted the original guidelines in
7 1987, it sought to ensure that some white collar offenders faced "*short* but
8 definite period[s] of confinement." U.S. Sentencing Commission, *Fifteen*
9 *Years of Guidelines Sentencing: An Assessment of How Well the Federal*
10 *Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 56
11 (Nov. 2004)(hereinafter "Fifteen Year Report"). The Commission thus
12 reduced the availability of probation and adopted a fraud guideline that
13 subjected a defendant to no more than 78 months in prison, even at the highest
14 loss levels. To justify the increase in the rate of confinement above
15 pre-guidelines practice, the Commission explained, without sufficient
16 empirical data, that the definite prospect of prison, though the term is short,
17 will act as a significant deterrent to many of these crimes, particularly when
18 compared with the status quo where probation, not prison, is the norm..
19 U.S.S.G., Ch. I, intro., pt. 4(d) {I 987}.

20
21 However, as noted above, the Commission has instead steadily
22
23
24

1 increased the prison sentences for fraud. The Commission has adopted this
2 radical shift in sentencing policy without the support of any empirical data
3 demonstrating the penological value of its substantial increases in sentence
4 severity. *United States v. Aide/son*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006)
5 (citing Kate Stith & Jose A.Cabranes, *Fear of Judging: Sentencing Guidelines*
6 *in the Federal Courts*, 69 (1998)» .[Be]cause of their arithmetic approach and
7 also in an effort to appear 'objective,' [the Guidelines] tend to place great
8 weight on putatively measurable quantities, such ... [the] amount of financial
9 loss in fraud cases, without, however, explaining why it is appropriate to
10 accord such huge weight to such factors.”

13 Because the Commission failed to cite empirical data - and thus failed to
14 fulfill its institutional role - sentencing courts have tremendous discretion to
15 disagree, on policy grounds, with §2B1.1's recommendations. *See Spears*, 555
16 U.S. 261, 264 (2009) (when the Commission fails to fulfill its institutional
17 role, a district court can vary from the guidelines "based on policy
18 disagreement with them, and not simply based on an individualized
19 determination that they yield an excessive sentence in a particular case").

22 Indeed, "since *Booker*, virtually every judge faced with a top-level
23 corporate fraud defendant in a very large fraud has concluded that sentences
24

1 called for by the Guidelines were too high. This near unanimity suggests that
2 the judiciary sees a consistent disjunction between the sentences prescribed by
3 the Guidelines [in corporate fraud cases] and the fundamental requirement of
4 Section 3553(a) that judges imposes sentences 'sufficient, but not greater than
5 necessary ' to comply with its objectives." Frank O. Bowman III, *Sentencing*
6 *High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167,
7 169,2008 WL 2201039, at *4 (Feb. 2008).
8

9
10 Statistics recently released by the Commission confirm this judicial
11 consensus. From October 1, 2012 through September 30, 2013, federal district
12 judges imposed sentences in approximately 8, 196 cases in which Guidelines
13 ranges were tallied pursuant (0 the fraud guidelines set out in §2B 1.1 . Fewer
14 than half of all of these cases (4,077) resulted in a sentence imposed within the
15 calculated guideline range, and in well over 2,000 cases judges on their own
16 initiative determined they should depart or vary downward from the sentence
17 suggested by §2B1.1. Indeed, in the more than 1,500 cases since FY 2013
18 featuring sentences falling below the Guidelines range as a result of a
19 judgment predicated on *Booker*, the median sentence was 12 months, a full 12
20 months below the average calculated guideline minimum (which represents a
21 median percent decrease of 53%). See Mark H. Allenbaugh, "*Drawn From*
22
23
24

Jeffrey K. Finer PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 *Nowhere". A Review of the U.S. Sentencing Commission's White-Collar*
2 *Sentencing Guidelines and Loss Data*, 26 Fed. Sent. R.19,26 (2013).

3 Courts have substantially varied from the guideline range based on: (1)
4 policy disagreements with §2B1.1's sentencing recommendations, (2) concerns
5 about unwarranted disparities vis-a-vis the many courts who have declined to
6 impose within guidelines sentences in fraud cases, and/or (3) mitigating
7 aspects of a particular defendant's character, good works, and history and/or
8 the nature and circumstances of his or her offense, As discussed at greater
9 length elsewhere in this Sentencing Memo, some of these very same factors,
10 particularly Ms. Nelson's background and character, as well as the
11 uncharacteristic nature and circumstances of the offense, weigh heavily in
12 favor of a variance.
13

14 But the lack of empirical validity behind the loss table in Guidelines
15 §2B 1.1 is sufficient justification alone for disregarding, and downwardly
16 varying from, the Advisory Guidelines Range in this matter.
17

18 Of course, even if the Court agrees that the Advisory Guidelines Range,
19 as calculated by the U.S. Probation Office and agreed to by the Government, is
20 appropriate for Ms. Nelson's offense, the Court is free to downwardly vary if
21 on other grounds, if it explains and justifies its reasons.
22
23
24

1 Ms. Nelson requests that the Court not be distracted by the alleged loss
2 calculation or the unduly prejudicial term of "Ponzi scheme." Rather, she
3 requests that it focus the unique circumstances of this offense and her
4 particular vulnerabilities.
5

6 (3 and 4) THE KINDS OF SENTENCES AVAILABLE

7 Whatever the Guideline calculation, Ms. Nelson asks the Court to
8 remember her lack of criminal history, her age, health, and family in Spokane.
9

10 (5) OMITTED

11 (6) THE NEED TO AVOID UNWARRANTED SENTENCING
12 DISPARITIES

13 In *Overview of Federal Criminal Cases, Fiscal Year 2012*, the authors
14 cited the following offender statistics after a plea of guilty:

15 When offenders pleaded guilty, 45.9 percent received a sentence below
16 the applicable sentencing guideline range, either at the request of the
17 government, at their own request, or initiated by the court.
18

19 Approximately 62 percent (62.4%) of these below range sentences were
20 requested by the government, usually because the defendant had
21 provided substantial assistance to the government or had agreed to have
22 his or her case handled as part of an early disposition program.
23
24

1 This would indicate, therefore, that 37.6 percent of these below range
2 sentences were at the request of the defendant or the decision of the sentencing
3 court.

4 The 2013 Annual Report and Sourcebook of Federal Sentencing
5 Statistics contains tables prepared to illustrate various sentencing
6 characteristics for fiscal year 2013. In Table N-9, COMPARISON OF
7 SENTENCE IMPOSED AND POSITION RELATIVE TO THE
8 GUIDELINE RANGE BY CIRCUIT, the Ninth Circuit had 18,241 total cases.
9 Of those, 6,466 (35.4%) were sentenced within the guidelines. Only 412 were
10 sentenced above the guideline range. The balance of cases, 11,363, were
11 sentenced at a level below the guideline range. Of those below the guideline
12 range, 2,417 cases were non-government sponsored.

13 In Table 25 of The 2013 Annual Report and Sourcebook of Federal
14 Sentencing Statistics, the report lists 33 reasons for a downward departure,
15 beginning with criminal history issues (29.7%) and general mitigating
16 circumstances (14.1%) all the way down the list to nonviolent offense/offender
17 (0.4%). Some of the reasons also cited in the Table which pertain to Ms.
18 Nelson are her family ties and responsibilities, mental and emotional
19 conditions, age, physical condition, and low likelihood of recidivism/not a risk
20
21
22
23
24

1 to the community. Similar numbers exist in the Eastern District Washington

2 (7) THE NEED TO PROVIDE RESTITUTION TO ANY VICTIMS OF
3 THE OFFENSE.

4 Ms. Nelson Defendant made available to the United States and to the
5 Bankruptcy Trustee all documents in her possession or under her control
6 which pertain to this investigation and prosecution or the bankruptcy
7 proceedings.
8

9 Undoubtedly, the Court will order restitution. How Ms. Nelson can
10 repay that restitution is another matter. All her assets have been seized. Her
11 companies and one of her husband's companies have gone through
12 bankruptcy. Counsel is being paid by Ms. Nelson's family and what few
13 personal funds Mr. Nelson has derived from his salary. For its part, the
14 government has never alleged that Ms. Nelson has hidden assets. Certainly, if
15 Ms. Nelson goes to prison, her ability to repay any restitution will cease. Any
16 amounts of money which the purported victims would receive would be
17 through the bankruptcy proceeding. Therefore, the only purpose a prison
18 sentence would serve would be to satisfy the some of the victims' desire for
19 incarceration apart from financial restitution.
20
21
22

23 **A VARIANCE IS APPROPRIATE IN THIS CASE**

24 A variance occurs when a judge imposes a sentence above or below the

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1 otherwise properly calculated final sentencing range based on an application of
2 the other statutory factors contained in 18 U.S.C. §3553(a). *United States v.*
3 *Rangel*, 697 F.3d 795, 801 (9th Cir. 2012) *cert. denied*, 133 S.Ct. 1294 (U.S.
4 2013) *citing United States v. Cruz-Perez*, 567 F.3d 1142, 1146 (9th Cir. 2009).

5
6 Advance notice of a variance request is not required by rule. *Irizarry v.*
7 *United States*, 553 U.S. 708 (2008). If the sentence is procedurally sound and
8 falls within a broad range of reasonable sentences, it will likely pass muster on
9 appeal. *United States v. Treadwell*, 593 F.3d 990, 1015 (9th Cir. 2010); *United*
10 *States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009). Courts have held that
11 variances are not subject to the guideline analysis for departures. *United States*
12 *v. Furno*, 655 F.3d 288, 317 (3d Cir. 2011), as amended (Sept. 15, 2011). A
13 shorter period of incarceration based on physical and mental disabilities has
14 been authorized by one court. *United States v. Almenas*, 553 F.3d 27 (1st Cir.
15 2009). Age and poor health may not meet the Guidelines' test for "departure"
16 in the particular case, but sentencing courts nonetheless must consider them if
17 they support a variance under *Booker* and Section 3553. *United States v.*
18 *Chase*, 560 F.3d 828, 830-31 (8th Cir. 2009); *United States v. Heldeman*, 402
19 F.3d 220, 224 (1st Cir. 2005); *United States v. White*, 506 F.3d 635, 640 (8th
20 Cir. 2007).

1 In the universe of fraud, the sticker shock of the losses is significant.
2 Ms. Nelson's history is remarkable. From a kitchen table in Abbotsford and a
3 need to be home with her children, Ms. Nelson built one of the nation's first
4 online payday loan companies. Without the benefit of a formal financial
5 education or any appreciable business experience, her success was as stunning
6 as it was fragile. The defense does not minimize the evident damage done to
7 her investors. But the perfect storm of economic collapse, bad business,
8 poorly-grounded business acumen, and panic are all sufficient reasons to
9 impose a sentence below the Guidelines. Unlike the traditional high-finance
10 Ponzi schemers, Ms. Nelson provided a legitimate service to thousands of
11 economically disadvantaged consumers from whom no complaint has been
12 heard.
13
14
15

16 CONCLUSION

17 Should the Court proceed with sentencing on November 3, 2014 or on
18 any other date, Ms. Nelson respectfully requests that it be mindful of the fact
19 that she had no prior criminal record, that she was involved in a business
20 which exceeded her wildest dreams and then she found herself in over her
21 head, and that she regrets her actions. Her physical and mental health is poor.
22
23 She enjoys the love of her husband, children, and grandchildren as well as
24

Jeffrey K. Finner PS

35 W Main Street • Suite 300
Spokane, Washington • 99201
509.464.7611 jeffry@finer-bering.com

1 community here in Eastern Washington. She therefore requests the mercy of
2 this Court.

3 DATED this 3rd day of October, 2014.
4

5 Respectfully submitted,
6

7

/s/Jeffry K. Finer
8 WSBA No. 14610

9

/s/Elizabeth Kelley
10 *Pro Hac Vice*

11 **CERTIFICATE**
12

13 I hereby certify that on October 3, 2014, I electronically filed the
14 foregoing with the Clerk of Court using the CM/ECF system, which will send
15 notification of such filing to Caitlin A. Baungard, Assistant United States
16 Attorney.
17

18

/s/Elizabeth Kelley
19
20
21
22
23
24